October 19, a distribution manager told petitioner Alston that DBCS #17 was contaminated with anthrax spores, but a manager later told employees that the machine was not contaminated. See 05-977 C.A. App. 33-34. The *Briscoe* petitioners also allege that, on Saturday, October 20, Postal Service officials told employees that a Postal Service worker had been admitted to the hospital the previous day "and was being examined for potential inhalation anthrax" but falsely stated that his infection with anthrax had not been confirmed. See *id.* at 36.

Counts I, II, and III of the *Briscoe* complaint allege violations of the procedural due process component of the Fifth Amendment. Petitioners allege that they were deprived of the remedies under their collective bargaining agreements, the protections of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, and the benefit of the Postal Service's emergency response procedures because of respondents' alleged misrepresentations. See 05-977 C.A. App. 41-43. Count IV of the complaint alleges a violation of the Fifth Amendment's substantive due process component. *Id.* at 43-44. Petitioners allege that they were deprived of their "substantive due process liberty interest in a safe work environment free from needless danger." *Id.* at 44.

Count I of the First Amended Complaint in *Richmond* alleges a violation of substantive due process based on respondents' alleged false representations about the dangers at the Brentwood facility. See 05-990 C.A. App. 46-47. Count II alleges an equal protection violation based on the contention that workers at the Brentwood facility were treated differently than congressional workers because of the different racial compositions of the two work forces. See *id.* at 47-48.

C. Proceedings Below

Respondents filed motions to dismiss in both cases, and the district court in each case granted the motion. Both courts concluded that the comprehensive statutory scheme governing Postal Service employment, which includes remedies under the FECA, precludes the courts from creating an additional *Bivens* remedy for the alleged constitutional violations. 05-977 Pet. App. 21a–31a; 05-990 Pet. App. 13a, 32a-41a. The district court in *Richmond* also observed that, even if the FECA does not cover petitioner Richmond's claim of racial discrimination, he has recourse to Title VII, which provides the exclusive remedy for racial discrimination in federal employment. *Id.* at 41a n.9.

Both courts also held that dismissal of the due process claims is required in any event because petitioners failed to allege a violation of a clearly established right and respondents are therefore entitled to qualified immunity. 05-977 Pet. App. 30a n.9, 31a-45a; 05-990 Pet. App. 15a-27a. The district court in *Richmond* further concluded that the equal protection claim must be dismissed because petitioner did not allege that respondents played any role in or had any control over Congress's decision about how to treat its employees. *Id.* at 27a-31a.

The court of appeals affirmed the district court's judgments in two unpublished, per curiam opinions. 05-977 Pet. App. 1a-4a; 05-990 Pet. App. 1a-3a. In each opinion, the court of appeals concluded that the *Bivens* "claims are precluded by an 'elaborate, comprehensive scheme' that Congress has provided to govern employees' injuries in federal workplaces." 05-977 Pet. App. 3a (quoting *Bush* v. *Lucas*, 462 U.S. 367, 385 (1983)); 05-990

Pet. App. 2a (same). With respect to petitioner Richmond, the court of appeals also noted that "to the extent FECA does not cover Richmond's racial discrimination claim, Title VII of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of racial discrimination in federal employment." *Id.* at 3a (citing *Brown*, 425 U.S. at 835).

ARGUMENT

The unpublished, per curiam decisions of the court of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Petitioners in both actions contend that review is necessary to clarify the application of principles set out in *Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988). Petitioners in *Briscoe* urge that review is required to address the application of those principles to their claims of procedural due process violations. 05-977 Pet. 20-22. Petitioner in *Richmond* asserts that review is necessary to determine the application of the principles to his substantive due process and equal protection claims. 05-990 Pet. 11-15.[3] The principles established by this Court in its *Bivens* cases are well-settled, and the court of appeals correctly applied those principles to the facts here.

a. This Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Chilicky*, 487 U.S. at 421. Indeed, in the past 25

[3] Petitioner Richmond also contends (05-990 Pet. i) that this Court should grant review to decide whether respondents are entitled to qualified immunity. That question is not properly before this Court because it was not addressed by the court of appeals. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

years, the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001). And, in cases like *Bush* and *Chilicky*, the Court has made clear that a *Bivens* remedy should not be created when Congress has enacted a "comprehensive statutory scheme[]" that provides some remedies. *Chilicky*, 487 U.S. at 428; see *Bush*, 462 U.S. at 368.

In *Bush*, the Court held that the "comprehensive procedural and substantive provisions" of the CSRA precluded a First Amendment *Bivens* claim by a plaintiff who asserted that he had been fired for criticizing his employing agency. 462 U.S. at 368. In reaching that holding, the Court expressly assumed that the civil service remedies were not as effective as a *Bivens* suit and would not fully compensate the employee for the alleged First Amendment violation. *Id.* at 372. But the Court concluded that the fact that "existing remedies do not provide complete relief" does not justify augmenting a carefully-crafted and "elaborate remedial scheme" by creating a "new judicial remedy" for constitutional violations. *Id.* at 388. The Court underscored "Congress' institutional competence in crafting appropriate relief for aggrieved federal employees as a 'special factor counseling hesitation in the creation of a new remedy,'" noting that "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees.'" *Malesko*, 534 U.S. at 68 (quoting *Bush*, 462 U.S. at 380, 389).

In *Chilicky*, the Court refused to imply a *Bivens* remedy for alleged procedural due process violations by Social Security officials because Congress had not included a money damages remedy in the "elaborate re-

medial scheme" created by the Social Security Act. 487 U.S. at 414. Once again, the Court explicitly noted that the statutory remedies did not provide complete relief. *Id.* at 425. The Court observed that the Social Security review scheme would provide the plaintiff with, at most, retroactive disability benefits and offered no possibility of additional redress for the harms caused by the alleged due process violations. *Id.* at 424-425. But the Court explained that, "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," it is inappropriate for a court to afford "additional *Bivens* remedies." *Id.* at 423.

Together, *Bush* and *Chilicky* firmly settled the principle that, when a statutory scheme provides a plaintiff with an "avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 69 (citing *Chilicky*, 487 U.S. at 425-427).

b. Applying that principle, the court of appeals correctly held that the statutory remedies available to Postal Service employees, including those provided by the FECA and Title VII, preclude implication of an extra-statutory *Bivens* remedy here.

Under the FECA, employees are "guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation." *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 194 (1983). An express condition of that comprehensive coverage is that liability under the FECA "with respect to the injury or death of an employee is exclusive and instead of all other liability." 5 U.S.C. 8116(c). Courts would disrupt the careful balance struck by Congress if they supplemented

the FECA remedial scheme with a judicially created money damages remedy. Congress has expressly addressed the question of monetary compensation for workplace injuries and has determined to foreclose litigation remedies in favor of guaranteed and "immediate, fixed benefits, regardless of fault." *Lockheed*, 460 U.S. at 194. Recognizing a *Bivens* remedy would re-open a door deliberately closed by Congress as a critical premise for creating a broad and comprehensive scheme to remedy workplace injuries.

Moreover, Postal Service employees have other statutory remedies besides the FECA that also make it inappropriate for courts to create a *Bivens* remedy. As described above, the PRA affords collective bargaining rights to postal workers not covered by the CSRA. See p. 3, *supra*. Employees thus have the right to file grievances over workplace safety and to have the grievances resolved through independent arbitration. See 05-977 C.A. App. 15-17; *Bennett* v. *Barnett*, 210 F.3d 272, 274-275 (5th Cir.), cert. denied, 531 U.S. 875 (2000). Several courts of appeals have held that the grievance procedures authorized by the PRA preempt *Bivens* claims.[4]

Congress has also addressed workplace safety through the OSH Act. The OSH Act is enforced by the Department of Labor, which has authority to issue citations, see 29 U.S.C. 658, and to seek injunctive relief, see 29 U.S.C. 662. Citations issued by the Department are

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[4] See *Bennett*, 210 F.3d at 275; *Pipkin* v. *United States Postal Serv.*, 951 F.2d 272, 275-276 (10th Cir. 1991); *McCollum* v. *Bolger*, 794 F.2d 602, 607 (11th Cir. 1986), cert. denied, 479 U.S. 1034, (1987); *Pereira* v. *United States Postal Serv.*, 964 F.2d 873, 875-876 (9th Cir. 1992); *Harding* v. *United States Postal Serv.*, 802 F.2d 766, 767-768 (4th Cir. 1986).

subject to review in the courts of appeals. See 29 U.S.C. 660; see generally *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3 (1985).

Finally, to the extent employees have claims about discrimination in the workplace, Postal Service workers, like other federal employees, are protected by Section 717 of Title VII, 42 U.S.C. 2000e-16. As this Court has held, Congress intended Title VII to provide the exclusive mechanism for federal employees to seek redress for claims of racial discrimination. *Brown*, 425 U.S. at 835.

2. The *Briscoe* petitioners urge this Court to augment the elaborate remedial scheme crafted by Congress with a *Bivens* remedy because, according to petitioners, respondents interfered with petitioners' use of the statutory remedies. See 05-977 Pet. 20-22. Petitioners cannot, however, meaningfully distinguish their situation from *Chilicky*, which also involved allegations that government officials violated the Constitution by preventing the plaintiffs from obtaining statutory benefits. The plaintiffs in *Chilicky* alleged that the officials deprived them of due process by deliberately undermining the procedures used to determine their eligibility for disability benefits; for example, by intentionally disregarding favorable evidence and by purposefully selecting biased physicians. 487 U.S. at 420 n.2. This Court nonetheless refused to create a *Bivens* remedy for what the Court described as "consequential damages for hardships resulting from an allegedly unconstitutional denial of a statutory right." *Id.* at 428.[5]

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[5] Moreover, petitioners' situation does not actually present the question whether a *Bivens* remedy would be available if government officials had prevented all meaningful access to statutory remedies. As the district court found, petitioners "failed sufficiently to allege that their

The *Briscoe* petitioners also assert that other federal courts have recognized a *Bivens* remedy where plaintiffs have alleged that defendants unconstitutionally interfered with their access to statutory remedies. 05-977 Pet. 23-26. But petitioners rely principally on cases that pre-date the Court's decision in *Chilicky* and therefore have no continuing vitality after that decision. For example, petitioners cite *Bishop* v. *Tice*, 622 F.2d 349 (8th Cir. 1980), which was decided several years before both *Bush* and *Chilicky*. Moreover, the analysis in *Bishop* is inconsistent with the Eighth Circuit's later opinion in *McIntosh* v. *Turner*, 861 F.2d 524 (1988), which adheres to the principle set out in *Bush* and *Chilicky*. Petitioners also invoke *Grichenko* v. *United States Postal Serv.*, 524 F. Supp. 672 (E.D.N.Y. 1981), aff'd, 751 F.2d 368 (2d Cir. 1984) (Table), which likewise pre-dates *Chilicky*. Moreover, a conflict with a district court opinion is not a basis for this Court to grant a writ of certiorari. See Robert L. Stern et al., *Supreme Court Practice* 178 (7th ed. 1993).[6]

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access to all of the remedies that they were entitled to [was] blocked by [respondents]. Nothing in the complaint suggests that [petitioners] were precluded from filing a grievance under their collective bargaining agreement, or a charge with OSHA, or utilizing any other post-exposure remedies that were available to them." 05-977 Pet. App. 28a n.8. Indeed, even now, petitioners do not contend that they were precluded from seeking compensation under the FECA.

[6] For that reason, petitioners are not assisted by *Rauccio* v. *Frank*, 750 F. Supp. 566 (D. Conn. 1990), which, although it was decided after *Chilicky*, failed to follow this Court's guidance. Moreover, as explained in note 5, *supra*, petitioners here, unlike the plaintiffs in *Rauccio*, have not adequately alleged facts that, if true, would demonstrate that respondents "have rendered effectively unavailable any procedural safeguard established by Congress." 750 F. Supp. at 571.

3. Petitioner Richmond argues that this Court has not considered whether a comprehensive statutory scheme bars creation of a *Bivens* remedy for egregious misconduct of the kind alleged here. 05-990 Pet. 12, 14-15. The decisions in which the Court has declined to imply a *Bivens* remedy, however, have all assumed that the plaintiff stated a claim of the deprivation of a clearly established constitutional right. See, *e.g.*, *Bush*, 462 U.S. at 372; *Chilicky*, 487 U.S. at 428. The Court has never suggested that it would be possible or appropriate to establish a hierarchy of constitutional rights in applying the *Chilicky* analysis. In any event, there is no reason to conclude that the constitutional violations alleged here are more worthy of a damages remedy via *Bivens* than the serious violations alleged in *Bush* and *Chilicky*.

Petitioner Richmond tacitly admits that he could seek relief for his injuries under the FECA but argues that the statutory remedy is inadequate because it is paid by the government and will not deter misconduct by federal officials. 05-990 Pet. 16-18. That argument proves too much, however, because it applies to any instance in which a statutory scheme does not include a damages remedy against individual employees. In both *Bush* and *Chilicky*, for example, the monetary relief provided by the statutory remedies was paid by the United States rather than the individual government officials. See *Bush*, 462 U.S. at 372 & n.8; *Chilicky*, 487 U.S. at 424. Petitioner's argument is premised on the misconception that he is entitled to relief because the remedies provided by Congress do not provide for the same recovery that he might obtain in a *Bivens* action. As this Court stressed in *Malesko*, "[i]t is irrelevant to a special factors analysis whether the laws currently on the books afford [the plaintiff] an adequate federal rem-

edy for his injuries." 534 U.S. at 69 (quoting *United States* v. *Stanley*, 483 U.S. 669, 683 (1987)).

For similar reasons, petitioner errs in contending that Title VII does not preclude a *Bivens* action for his equal protection claim because he cannot state a claim under the statute. 05-990 Pet. 19-20. A *Bivens* remedy is not available simply because the statutory scheme does not provide complete or even adequate relief. See *Chilicky*, 487 U.S. at 425 (observing that "[t]he creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed"); *Bush*, 462 U.S. at 373 (assuming that "Congress has provided a less than complete remedy for the wrong"). To the contrary, a court has no basis to create a damages remedy against a federal official for conduct that Congress chose not to make actionable. See *Chilicky*, 487 U.S. at 429; see also *Bush*, 462 U.S. at 385 n.28 (refusing to create a *Bivens* action even though the statutory scheme provided no remedy for short suspensions or adverse personnel actions against probationary employees).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-977

In The
Supreme Court of the United States
October 2005 Term

DENA BRISCOE, *et al.*,

Petitioners,

v.

JOHN E. POTTER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

In their Petition for Writ of Certiorari, Petitioners raised an important question of federal law, namely, whether a *Bivens*-type action is maintainable where a plaintiff alleges that a defendant violated his procedural due process rights by interfering with or rendering unavailable contractual or statutory remedies that the plaintiff otherwise had the right to pursue. In this case, it was especially important that Petitioners be able to invoke the remedies at issue in a timely manner to protect themselves from imminent danger: continued exposure to a highly potent, "weaponized" form of anthrax that had contaminated their workplace in October 2001.

Respondents argue in their Brief For the Respondents In Opposition ("Resp'ts' Br.") that the Court answered this question in *Schweiker v. Chilicky*, 487 U.S. 412 (1988). *See* Resp'ts' Br. at 12. Respondents' argument misses the mark, however, because it misconstrues the question presented in *Schweiker*.

In *Schweiker*, the plaintiffs' social security disability benefits were terminated improperly. Although the plaintiffs' benefits were subsequently restored, the plaintiffs brought a *Bivens*-type action seeking consequential damages for the economic and emotional hardships they suffered as a result of the termination. *Schweiker*, 487 U.S. at 428. The question in *Schweiker* was whether the plaintiffs could recover money damages above and beyond the restoration and retroactive payment of benefits they had achieved by invoking preexisting statutory remedies. The question was not whether

the plaintiffs were unconstitutionally deprived of a statutorily created remedial scheme or any portion thereof.

The case at bar presents a very different question. Petitioners alleged that Respondents prevented them from invoking remedies otherwise available under their collective bargaining agreements, the Occupational Safety and Health Act, and other provisions by lying to them about anthrax contamination at the Brentwood facility. Moreover, time was of the essence. The imminent danger posed by exposure to weaponized anthrax spores made it all the more necessary for Petitioners to be able to invoke these remedies as quickly as possible in order to protect themselves and their co-workers from continued exposure. Under such circumstances, wherein Petitioners were prevented from invoking remedies that would have protected them from continued exposure to anthrax, it is not enough for Respondents to point to the Federal Employees Compensation Act ("FECA") and assert that workers who became ill or died as a result of exposure to anthrax could later seek compensation under FECA. Our constitution requires these workers to have been treated better.

The "special factor" militating against the creation of a *Bivens* remedy that the Court found to exist in *Schweiker* does not exist in a case such as this because it makes no difference whether a comprehensive statutory or contractual scheme exists if the plaintiffs are prevented from availing themselves of the remedies contained therein. The court in *Rauccio v. Frank*, 750 F. Supp. 566, 571 (D. Conn. 1990), a case decided *after* this Court's decision in *Schweiker*, correctly recognized this critical distinction:

> However, as plaintiff points out, *Bush v. Lucas* and its progeny are premised on the existence and availability of an adequate system of procedural safeguards through which a plaintiff may seek relief. In the instant case, the plaintiff's due process claim is premised on the defendants' interference with the procedural mechanism which Congress has created for the protection of employees. It is in this critical respect that *Bush v. Lucas* and the related cases cited by defendants are distinguishable. In each, the availability of an adequate procedural remedy was fatal to plaintiff's *Bivens* claims. In this case, assuming plaintiff's factual allegations to be true, defendants have rendered effectively unavailable any procedural safeguard established by Congress. Thus, *Bush* and its progeny are inapplicable to the facts of this case.

The Court should, thus, take this opportunity to address the novel question of law presented in this case and declare that a procedural due process, *Bivens*-type remedy is maintainable if it is alleged that the defendant interfered with or otherwise rendered unavailable the substantive statutory or contractual remedies that the plaintiff had a right to pursue.[1]

---

[1] Respondents argue in a footnote that "petitioners' situation does not actually present the question whether a *Bivens* remedy would be available if government officials had prevented all meaningful access to statutory remedies" because petitioners "failed sufficiently to allege that their access to all of the remedies that they were entitled to [was] blocked by [respondents]." Resp'ts' Br. at 12 n.5. Respondents are clearly wrong, as Petitioners alleged in their Complaint that Respondents interfered with and prevented Petitioners from pursuing their statutory and contractual administrative remedies during the critical four days that Respondents

Respondents also misconstrue the holding in *McIntosh v. Turner*, 861 F.2d 524 (8th Cir. 1988), as inconsistent with *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980). *See* Resp'ts' Br. at 13. In *McIntosh*, the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") was called upon to decide whether a federal employee could bring a *Bivens* cause of action for money damages for the denial of the right to be considered for a promotion on a fair and unbiased basis. The Eighth Circuit concluded that the plaintiffs' cause of action was maintainable because the available civil service statutory remedies were inadequate in that they did not provide for money damages for a violation of a constitutional right when federal employees are denied promotions on an unfair and biased basis. *McIntosh v. Weinberger*, 810 F.2d 1411, 1435-36 (8th Cir. 1987).

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knew the Brentwood facility was contaminated with anthrax but still kept the facility open. *See Complaint* at ¶¶ 19, 20, 22, 23, 25, 26, 29, 30-34, 43-47, 49-76, 78-84, 86, 87, 89, 92-97, 100, 101, 103, 105, 107, 111, and 112. Respondents prevented Petitioners from pursuing their administrative remedies during these four days by coercing, intimidating, and threatening Petitioners not to make inquiries about the Daschle letter, the safety of the facility, or their own safety, and making false and/or misleading statements to Petitioners that the Brentwood facility was safe and that there was no evidence of anthrax contamination at the facility, among other false and/or misleading statements. *Id.* But for Respondents' illegal conduct, Petitioners would have timely invoked the remedies available to them under their collective bargaining agreements and the OSHA, as well as USPS emergency response procedures to have the facility shut down. *Id.* When the facility eventually was shut down after the four days in which Petitioners were needlessly exposed to anthrax contamination, Petitioners lost forever their right to pursue their remedies to have the facility closed.

This Court, however, vacated and remanded the case in light of its decision in *Schweiker*. *See Turner v. McIntosh*, 487 U.S. 1212 (1988). Upon remand, the Eighth Circuit abandoned its reasoning in light of *Schweiker* that a *Bivens'* type remedy is available if Congress fails to provide an adequate remedy for federal civil service employees who bring constitutional challenges to personnel actions. Contrary to Respondents' contention in the case at bar, however, the Court did not abandon the rule established in *Bishop*, namely, that a *Bivens*-type remedy is available if government officials prevent a plaintiff from availing himself of pre-existing remedies he is entitled to pursue. Ultimately, the Eighth Circuit found in *McIntosh* that Congress had provided remedies to the plaintiffs, even though those remedies might not be adequate. *McIntosh*, 861 F.2d 526. As a result, the plaintiffs could not maintain their *Bivens* claim. *Id.*

Lastly, despite the fact that Respondents admit Petitioners' allegations must be taken as true for purposes of review, Respondents nonetheless improperly attempt to influence this Court's deliberations, as they did in the district and appellate courts, by citing extraneous materials not mentioned in or attached to Petitioners' Complaint and not subject to judicial notice. *See* Resp'ts' Br. at 4 n.1. This Court must reject Respondents' improper litigation tactic as, in evaluating a Federal Rule of Civil Procedure 12(b)(6) motion, a court may only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2nd Cir. 1991) (On motion to dismiss, court must limit itself to facts stated in complaint or in documents attached to complaint as exhibits or incorporated

in complaint by reference.); *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3rd Cir. 1994) (On motion to dismiss, court must consider only those facts alleged in complaint.); *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984) (Consideration of matters beyond complaint is improper in context of motion to dismiss); and *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624-25 and n.3 (D.C. Cir. 1997) (On motion to dismiss, court may consider only facts alleged in complaint, any documents either attached to or incorporated into complaint, and matters of which court can take judicial notice.).

Federal Rule of Evidence 201(b) states that a court may only take judicial notice of a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." This Court has recognized that "[j]udicial notice cannot be used to shortcut the evidentiary hearing process," so a court must not take judicial notice of facts contained in government reports if the facts are disputed and/or the facts go to the ultimate issue in the case, as do the facts in the government report that the Respondents improperly cite in the instant case. *Korematsu v. United States*, 584 F. Supp. 1406, 1415 (N.D. Cal. 1984). As a result, the Court should reject Respondents' improper references to extraneous matters outside the pleadings.

CONCLUSION

Petitioners respectfully request that a writ of certiorari be issued to resolve this important question of federal law that has not been, but should be, settled by this Court.

Respectfully submitted,

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